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ferent from a statute forbidding repeated suits for trespasses by the same party on the same land, of the propriety of which there can be no question, since courts of equity will decree the same on general principles, but a court of law could not enforce the rule without a statutory provision.

We have thus sufficiently shown the impropriety of invoking the reserved rights of the state to apply private property to public use in order to justify the Mill Acts, as they are called; since this is in no sense a public use, and the acts are sufficiently justified upon general grounds of legislative authority. We trust there will not, therefore, be any repugnance felt to the two decisions we are commenting upon, because they leave no ground for the Mill Acts to stand upon.

We hope, too, that we have sufficiently shown that a public use sufficient to justify either taxation or the taking of private property on compensation, must be for the accomplishment of some duty resting primarily upon the state or nation. We shall not further discuss the question, how far the delegation of these public duties to private corporations, such as railway and canal companies, will carry the right to uphold them by taxation. It will, no, doubt, justify the exercise of the right of eminent domain, and hence, we think unjustly, most of

our courts have concluded the right of taxation might be exercised on their behalf. The very fact of committing these public trusts to private companies seems to imply that they are to be carried forward by the money of such companies. No doubt, the state or nation may subsidize such companies. But the attempt to do this by allowing the municipalities to become members of these private companies must surely be an anomaly, and we look for some period to arrive when the courts will so regard it. We look upon these decisions as having removed the principal grounds upon which building railways by taxation has been hitherto justified, viz., that it was applying the money to a public use, which a private railway is not, in the sense of the American constitutions, at least so far as taxation is concerned, which should never be resorted to for upholding a private enterprise.

We need not attempt to add to the argument in the principal case, to show that if "public use" embraces all uses, which conduce to the public good, it will extend to all businesses in the country, since none other could be maintained, and thus throw all private property into the public treasury, to be redistributed at the pleasure of the legislature, a state of things no one will justify, even in argument.

I. F. R,

Supreme Judicial Court of Massachusetts.

**BOSTON AND ALBANY RAILROAD COMPANY v. SHANLY ET AL.
CARNEY v. SAME.**

An action may be maintained by a common carrier against a person knowingly sending by such carrier explosive and dangerous articles, recently discovered and manufactured, not known to the carrier to be such, and without notice of their character, for any damages caused by the explosion thereof from their inherent tendency to explode or improper packing.

But not against a person who merely orders the same to be so sent as a purchaser, although he gives no such notice.

If two persons, without any concert or knowledge of each other's acts, so send

two such articles, one of which causes the explosion of the other, an action may be maintained against them jointly.

A third person, whose property near the railroad is injured by the explosion, may also maintain such action.

If the action is brought in the name of the third person for the benefit of the carrier as assignee, this is no ground for demurrer.

THESE were actions of tort for injury by an explosion on a train of the railroad company in Worcester, Mass., which damaged cars and property on the train and in the neighborhood to a large amount. It appeared that an explosive substance called "dualin," and a box of articles used to explode the same, were on the same car of the train, and these actions were brought against the parties concerned in ordering, manufacturing and sending them.

The first action was by the company for damages to their cars and other property.

The second action was in the name of the owner of a building and other property in the neighborhood, alleged to have been injured, but the action was brought for the use of the plaintiffs in the first, as assignees of Carney.

Demurrers were filed on the ground that the declarations did not allege any legal cause of action or any joint tort or negligence participated in by the parties demurring; that the allegation of damage was too indefinite; that the plaintiff's own negligence contributed to the injury; and in Carney's case, on the ground, also, that it appeared that the plaintiff had been paid by the railroad company, which now sued to recover the amount paid him for their own negligence; that they could not sue in his name for their own benefit, and that no facts were set forth to show that the cause of action was assignable.

George S. Hale, for the plaintiffs.

J. W. Perry and *W. C. Endicott*, for the Oriental Powder Company and others, charged with sending the exploders.

Charles Allen, for the Shanlys.

George Sennott, for Burkhardt and the Dittmars.

Hale cited as to the maintenance of the actions in general: *Carter v. Towne*, 98 Mass. 567; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; Addison on Torts 16; St. 29 & 30 Vict. ch. 39; *Williams v. East India Co.*, 3 East 192; *Langmaid v.*

Holliday, 6 Exch. 761-767; *Brass v. Maitland*, 6 El. & Bl. 471; *Hutchinson v. Guion*, 5 C. B. N. S. 149; *Farrant v. Barnes*, 11 Id. 553; *Thomas v. Winchester*, 6 N. Y. 397; *Pierce v. Winsor*, 2 Clifford 18; *Penton v. Murdock*, 2 Law Times N. S. 871; *Illege v. Goodwin*, 5 C. & P. 190.

As to the joint liability of the parties: *Lynch v. Nurdin*, 1 Q. B. 35; 1 A. & E., N. S. 29; *Colegrove v. N. Y. & N. H. &c., Co's.*, 20 N. Y. 492; *Thorogood v. Bryan*, 8 C. B., M. Gr. & S. 115; *Hawkesworth v. Thompson*, 98 Mass. 77; *Eaton v. Bost. & Low. R. R. Co.*, 11 Allen 500; *Abbott v. McRie*, 2 H. & C. 744; *Stone v. Dickinson*, 5 Allen 29.

As to the liability of the Shanlys particularly, he contended as follows:¹ Taking the respective defendants in two classes, which may be called the "Dualins" and the "Exploders"—the "Dualins" consist of the Shanlys, who gave express orders to have the dualin manufactured, and sent by the plaintiff's road, knowing its dangerous qualities, without warning or notice to the plaintiff, and the Dittmars, and Burkhardt, who manufactured it, and knowing its qualities, delivered it, without notice, representing that it was safe, for the Shanlys and at their request, to be carried to them by the carriers selected and designated by them.

The "Exploders" consist of the Shanlys, who gave a similar order as to the exploders, with like knowledge and concealment of their qualities, and the Powder Company, who by its specific officers and agents prepared them, and in conformity with the order, knowing their dangerous qualities, delivered them as is alleged, without notice, and representing that they were safe.

The Shanlys gave express orders that the Dualin should be manufactured for them, and sent to them over the plaintiff's road. On general principles and under the cases already cited, they are liable.

They set in motion the dangerous article, knowing its qualities, and there was a natural and probable connection between this wrong done by them, and the injurious consequences which have followed: *Lynch v. Nurdin*, 1 Q. B. 36; *McDonald v. Snelling*, 14 Allen 290; *Scott v. Hunter*, 46 Penn. St. R. 192; *Thomas v. Winchester*, 6 N. Y. 397. If A. orders B. to commit a trespass, he is jointly liable with B.: Com. Dig. *Trespass*, c. 1; Dicey on Par-

¹ This portion of the argument is given more at length as the court held them not liable.

ties 440; *Robinson v. Vaughton*, 8 C. & P. 252, 255. So he must be when he orders B. to place or send dangerous goods where they may injure third persons, as much as if he sold them to be resold: *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64. In this case the other defendants were the agents of the Shanlys in delivering the dualin for carriage to the carrier indicated by them. In the language of GIBSON, C. J., in *Griffith v. Ingledew*, 6 S. & R. 437: "Where goods are delivered to a carrier, pursuant to an order of the vendee, who has not himself settled the terms, the vendor, where he makes a special agreement with the carrier, without expressly making himself liable, will be considered as having contracted, as the agent, and in behalf of the vendee; for the order necessarily includes the ancillary power to make such a contract, without which such order could not perhaps be executed; and, therefore, where the carrier does not enter into the contract, on the personal guarantee of the vendor, he will be considered as looking to the vendee, between whom and himself there is sufficient privity of contract and mutuality of remedy to give either an action on the agreement."

The Shanlys alone, on the facts alleged on the declaration, could maintain an action for the goods or be sued for the freight.

In Dicey on Parties to an Action 87, the author says: "1st. The contract for carriage is, in the absence of any express agreement, presumed to be between the carrier and the person *at whose risk the goods are carried*, i. e., the person whose goods they are and who would suffer if the goods were lost. This person is ordinarily the consignee; for when, as is often the case, he is the purchaser of the goods, delivery of the goods by the vendor to the carrier, operates as delivery to the purchaser or the consignee. It is for him the goods are carried, and the consignor in employing the carrier, is considered as agent of the consignee for that purpose." See also Powell on Carriers 207, 208; Angell on Carriers, §§ 495, 497, 499; *Blanchard v. Page*, 8 Gray 281, 287-300.

So, had the Shanlys sued for damages to the same goods, evidence that the damage arose from their peculiar nature (unknown and not communicated to the defendants), which required certain precautions in stowage, would have defeated the claim: *Hutchinson v. Guion*, 5 C. B. N. S. 149.

In *Farrant v. Barnes*, 11 C. B. N. S. 553, the defendant's fore-

man requested one R., the servant of a carrier, P., to forward the vitriol; but being unable to take it, R. applied to the plaintiff, the servant of another carrier, to take it for him; and it is submitted that the Shanlys are within the same liability, and as nearly connected with the transaction. They ordered and requested the other defendants to forward the explosive articles by means of the plaintiff's cars.

In *Herne v. Garton*, 2 El. & El. 64, where the respondents to a complaint for sending dangerous goods had received them from one N., and being misled by him did not give notice of their character, while they were held not liable criminally for want of guilty knowledge, it was thought they might have been liable civilly; and CROMPTON, J., said, p. 75, "It was N. who sent these goods knowingly. . . . I think that N. would probably be liable under the act." Lord CAMPBELL gave no opinion as to this. The case seems to show that the goods were N.'s and given by him to the respondents to be forwarded, and that he was present at the delivery to the carrier.

As to damages, he cited: Sedgwick on Damages 109; *Dixon v. Bell*, 1 Stark. 228; *Richardson v. Chasen*, 10 Ad. & El. N. S. 756

The counsel for the defendants cited: *Brass v. Maitland*, 6 El. & Bl. 470; *Davidson v. Nichols*, 8 Allen 75; 11 Allen 514; *Van Steenburg v. Tobias*, 17 Wend. 562; *Adams v. Hall*, 2 Vt. 9; *Auchmity v. Ham*, 1 Denio 495; *Williams v. Sheldon*, 10 Wend. 654; *Guille v. Swan*, 19 Johns. 381; *Russell v. Tomlinson*, 2 Conn. 206; *Coryton v. Lithebye*, 2 Saunders 117 a, 117 b, notes by Williams; *Buddington v. Shearer*, 20 Pick. 479; *Parsons v. Winchell*, 5 Cush. 592; *Albro v. Jaquette*, 4 Gray 99; *Colegrove v. N. Y. & N. H. Railroad Co.*, 6 Duer 382; 20 N. Y. 493; DUER, J., dissenting opinion, 6 Duer 419; *Carter v. Towne*, 103 Mass. 507; *Flower v. Adams*, 2 Taunt. 314; *Tutein v. Husley*, 98 Mass. 211; *Thomas v. Winchester*, 2 Selden 397; *Wellington v. Downer Kerosene Co.*, 104 Mass. 64; *Thorogood v. Bryan*, 8 M., G. & S. 115; *Lockhart v. Leichtenthaler*, 46 Penn. St. 151; *Cleveland Railroad Co. v. Terry*, 8 Ohio 570; *Peterbaugh v. Reason*, 9 Ohio St. 34; *Brown v. N. Y. Central Railroad Co.*, 31 Barb. 335; 2 Redf. Railw. 196, 3d ed.; *Smith v. Smith*, 2 Pick. 621; *Lamb v. Crafts*, 12 Met. 356; *Gardner v. Joy*, 9 Id. 177; Addison on Torts, 3d

ed. 393-395; *Butler v. Hunter*, 7 H. & N. 826; *Sadler v. Henlock*, 4 El. & Bl. 578; *Reedie v. London, &c., Railway*, 4 Exch. 255; Bell on Contracts of Sale 84, 86, 87, 89; 2 Kent Com. 500; Story on Sales (4th ed.), §§ 305, 388, 390; Brown on Sales, §§ 523, 525, 526; 1 Parsons's Cont. (5th ed.) 532, 533; Benjamin on Sales 515; *Judson v. Western Railroad Co.*, 4 Allen 520; *Norway Plains Co. v. B. & M. Railroad*, 1 Gray 275; *Clark v. Hutchins*, 14 East 475; *Buckman v. Levi*, 3 Camp. 414; *Finn v. Clark*, 10 Allen 479; 12 Id. 522; *Finn v. W. Railroad Corp.*, 102 Mass. 283-288, 289-290; 2 Redf. on Railw., § 176, art. 4; Redf. on Carriers, § 135; *Coombs v. Br. & Ex. Railroad Co.*, 3 H. & N. 6, by WATSON, B.; *Hudson v. Baxendale*, 2 H. & N. 575; Addison on Con. 480; *Wood v. Cobb*, 13 Allen 59; *Forsyth v. Hooper*, 11 Allen 419, 421; *Brackett v. Lubke*, 4 Id. 138; *Linton v. Smith*, 8 Gray 147; *Hilliard v. Richardson*, 3 Id. 349; *Coomes v. Houghton*, 102 Mass. 213; *Quarman v. Burnett*, 6 M. & W. 499; *Milligan v. Wedge*, 12 Ad. & El. 737; *Rapson v. Cubitt*, 9 M. & W. 713; Story on Agency (Redf. ed.) § 452 b.; *Williams v. East India Co.*, 3 East 192; *Farrant v. Barnes*, 11 C. B. N. S. 553; *Carter v. Towne*, 98 Mass. 568; *Herne v. Garton*, 2 El. & El. 66; *Pierce v. Winsor*, 2 Sprague 36; s. c. 2 Clifford 18; Addison on Con. (6th ed.) 470; Addison on Torts (3d ed.) 16, 407, 451, 455, 456; *Walker v. Jackson*, 10 M. & W. 161; *Putnam v. Tillotson*, 13 Met. 517; *Merchants' National Bank v. Banks*, 102 Mass. 295; *Gilman v. Eastern Railroad*, 10 Allen 236, 237; s. c. 13 Id. 440; *Felch v. Allen*, 98 Mass. 572; *Seaver v. Boston & Maine Railroad*, 14 Gray 466; Smith's Master and Servant (3d ed.) 107, 108; Story on Agency, §§ 217, 308; Met. on Con. 11; *Parsons v. Winchell*, 5 Cush. 592; *Hewett v. Swift*, 3 Allen 425; *Campbell v. Phelps*, 1 Pick. 62.

The opinion of the court in the first case was delivered by

CHAPMAN, C. J.—This case comes before us upon a demurrer to the plaintiffs' declaration. The action is against Walter and Francis Shanly, of North Adams, Hugo and Carl Dittmars, and Gottlieb F. Burkhardt, of Boston, and The Oriental Powder Company, a corporation established in Boston, and Jackson, Newhall, Smith and Hurds, of Boston, the officers or agents of the company.

The first count alleges that the plaintiffs are common carriers, between Boston and North Adams, upon their own railroad from

Boston to Pittsfield; and thence to North Adams upon the Pittsfield and North Adams Railroad, of which they are lessees; that said Dittmars and Burkhardt manufactured for said Shanlys, at their request, as well as for other persons, a new dangerous explosive, combustible and inflammable substance, called by a new name not generally known (but afterwards called *dualin* in the declaration), now in the market, and the qualities not generally known, and made in part of nitro-glycerine, which is of itself an explosive and dangerous substance; that the Oriental Powder Company and its said officers and agents also manufactured for the Shanlys, at their request, as well as for other persons, certain dangerous articles called *exploders*, designed to be used for exploding said new compound; that the Shanlys, knowing the dangerous character of said compound, and of said exploders, ordered and requested said Dittmars and Burkhardt to send to them at North Adams, in the plaintiffs' cars, a quantity of said compound, and ordered and requested the said Oriental Powder Company to send them in the same way a quantity of said exploders, but gave no notice to the plaintiffs of the dangerous character of either of said articles; that the Dittmars and Burkhardt sent ten cases of the compound, and delivered them to the plaintiffs as ten cases of dualin, knowing them to be of a dangerous character, but did not give notice to the plaintiffs, nor did the plaintiffs know of their dangerous character, but the Dittmars and Burkhardt declared that they were safe and not of a dangerous character; that the Oriental Powder Company and their said officers and agents sent two hundred pounds of exploders accordingly, but packed them in an improper and dangerous manner, and gave the plaintiffs no notice of their dangerous character, but delivered them as "one box," and the plaintiffs did not know of their dangerous character; that the dualin and exploders did, by reason of their nature and improper packing, take fire and explode, and the exploders taking fire and exploding, caused the dualin to explode, and this taking fire and exploding, both separately and by the combination thereof, destroyed sundry cars and other property of the plaintiffs, and other goods which they had as carriers, and for which they were liable to pay.

Both the dualin and the exploders are thus alleged to be explosive and dangerous articles. Each of them was sent without giving notice of its character to the plaintiffs, and they were ignorant

in respect to it. The rule of law on this subject is in conformity with the dictates of common sense and justice, and is well established. One who has in his possession a dangerous article, which he desires to send to another, may send it by a common carrier if he will take it; but it is his duty to give him notice of its character, so that he may either refuse to take it or be enabled, if he takes it, to make suitable provision against the danger. The reason for requiring this notice is still stronger, if other persons would be exposed to danger from it, but the duty is the same. This principle is established in application to the sending of goods by carriers in *Williams v. East India Co.*, 3 East 192; see also *Brass v. Maitland*, 10 El. & Bl. 470; *Farrant v. Barnes*, 11 C. B. 557.

The duty does not arise from any contract express or implied, but from the principle expressed in the maxim, *Sic utere tuo ut alienum non lædas*. The principle is held by this court in its broadest signification. In *Carter v. Towne*, 98 Mass. 567, it was held that a trader who sold gunpowder to a boy eight years of age, who had no knowledge or experience in the use of it, and was unfit to be trusted with it, and injured himself afterwards by its explosion, was liable to an action for the damage. In *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64, an action was maintained against a retailer of fluids, for knowingly selling naphtha, a dangerous article, to be burnt in a lamp, the plaintiff being ignorant of its qualities. There are numerous cases which sustain this principle in various forms, but these are sufficient for its illustration.

This principle is not changed by the alleged fact that the Shanlys requested the Dittmars and Burkhardt to manufacture a quantity of the dualin in an unusually dangerous manner, and that they did so manufacture it. If it was a dangerous article, the duty of the sender was to give the notice, and if it was so in an unusual degree that fact only made the duty more important.

But assuming that these parties were guilty of a violation of duty as alleged, it is yet contended that the manufacturers of the dualin and the manufacturers of the exploders cannot be joined in one action for the injury. It is not alleged that these parties acted in concert in making the several articles, or placing their respective articles in the plaintiff's care, nor even that they had knowledge of each other's proceedings. Each acted separately in

sending goods and omitting to give notice. But each party violated his duty none the less because he was ignorant as to what other articles were to be carried in the same car with his. By neglecting to give the notice, he took the risk of any danger that might reasonably be apprehended from the proximity of other goods that the carrier might take in ignorance of the danger. If, as the declaration imports, dualin and exploders are ordinarily used together, any person sending either of the two substances might reasonably apprehend the possibility that a quantity of the other substances might be carried with it. Nor is it material which of the articles caused the other to be ignited. Practically, a single injury was produced, and it is impossible to distinguish how much of it was actually produced by the exploders and how much by the dualin.

The defendants cite a remark of Chief-Justice SHAW in *Marble v. Worcester*, 4 Gray 397, which, if they interpret it correctly, would leave a wrongdoer to injure others with impunity if other wrongdoers were guilty of independent acts that contributed to produce the same injury.

But the Chief Justice himself applied the remark to the case before him, which was an action upon a statute against towns; and the case is to be limited in its application, to actions against towns: *McDonald v. Snelling*, 14 Allen 290.

They also contend that the case is like those where it is held that a joint action will not lie against the several owners of dogs which have together worried a flock of sheep, each owner being separately liable for the damage done by his own dog: *Buddington v. Shearer*, 20 Pick. 477; *Van Steenburg v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Denio 495; *Russell v. Tomlinson*, 2 Conn. 206.

But in such cases there is no concurrence of interest or action among the several owners of the animals in producing the same injury. A person's responsibility for the act of his dog arises from the fact of ownership, and rests on different ground from that of his responsibility for the physical action of a chemical or mechanical substance prepared and sent by him, or of a nuisance which he had so placed as that it will occasion injury to others. This act is the direct cause of the injury done by such means. In this case the parties who wrongfully sent the dangerous substances were contributors to the catastrophe as much as if they had sepa-

rately contributed to the raising of a pile of offal which occasioned an offensive odor, or had at one time separately fired a building by distinct torches, each of which contributed to a conflagration of the whole. It cannot be that because the several wrongdoers have so contributed to the injury that it is impossible to distinguish what portion of it was caused by each, therefore they can escape with impunity. On the contrary, each is liable for the whole. The case is similar to *Stone v. Dickinson*, 5 Allen 29, and 7 Id. 260, where several creditors of Stone brought actions against him, and each caused him to be imprisoned for the same space of time. The injury being one, it was held that, though there had been no concert between them, he could maintain one action against all, and each was liable for the whole damage. The same doctrine was held in *Ellis v. Howard*, 17 Vt. 330. The many ways in which wrongdoers may injure another give rise to some nice distinctions, but when their several acts directly contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of injury caused by each, that concurrence ought to render each of them liable for the whole in a joint action. On this ground, the manufacturers who sent the articles are jointly liable in this action.

The liability of the Shanlys depends upon their concurrence in the tortious acts of the other defendants. The declaration cannot be fairly construed as alleging that the manufacturers were their servants or agents. It is alleged that they were manufacturers of the dangerous articles for the Shanlys and others.

The allegation that the Shanlys ordered and requested each of them to send a specified quantity of these articles to them by the plaintiffs' railroad, imports an order from a purchaser such as is usually given by purchasers to manufacturers. If the articles were required in the order to be of unusual strength, this is not unlike the order for spirits of unusual strength, or cloth of unusual weight or fineness, or peculiar color, and does not change the nature of the transaction. Nor does it imply a request that the goods should be carelessly or improperly packed, or that there should be any neglect to give such notice to the carriers as would be proper. If nothing was said on these subjects, it would be implied that the packing and whatever else was proper, including notices and directions, should be properly attended to.

It being the duty of the senders to give proper notice of the

character of the goods to the carrier, the question arises whether it was also the duty of the consignee to give such notice. There is no authority for holding him to be thus liable, and it would be useless and unreasonable to require it of him. It should be given at or about the time of offering him the goods. The consignee is not likely to know the time, especially if he lives at a distance; nor is he likely to know what articles may be sent together; nor is there any occasion to send an additional notice, it being the duty of the consignor to give notice. In this case it is not alleged that the Shanlys requested the consignors to neglect any duty or conceal any fact, and there is no ground to hold them responsible for the negligence or improper conduct of the other defendants.

[In the second case we give only so much of the opinion as refers to the point not made in the first.]

CHAPMAN, C. J. [After disposing of various grounds of demurrer by reference to the foregoing opinion.]—The fourth cause of demurrer assigned alleges that it appears from the plaintiff's writ and declaration that the plaintiff has received full compensation for all the damages suffered by him, and that the Boston and Albany Railroad Company have paid him, and sue in his name to recover back the amount so paid by them; and the defendants show that if the Boston and Albany Railroad Company have paid said damages to the plaintiff, it was because their negligence had rendered them liable to pay him, and if they were negligent and liable to pay him, he cannot maintain this action. This statement includes an alleged cause of demurrer, and an argument. It is sufficient to say in respect to it, that the writ merely alleges that the action is brought for the benefit of the Boston and Albany Railroad Company as assignees. This does not imply any fault or liability on the part of the assignees. The assignment may have been made for a variety of reasons. The allegation in the writ is mere surplusage; it can only operate as a notice of such equitable rights as the assignment may confer; nor is the allegation in the writ mentioned as a cause of demurrer.

In both cases the demurrer of the Shanlys is sustained, and the demurrers of the other defendants are overruled.
